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# Watch: Why This Video Could Doom Kik's SEC Fight

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A video from 2017 shows Ted Livingston seemingly promoting the investment potential of Kik's Kin cryptocurrency. | Source: Flickr/TechCrunch

Kik CEO Ted Livingston may have already doomed the chat app's chances to win its high-profile legal battle with the US Securities and Exchange Commission (SEC) regarding its Kin cryptocurrency, a video uncovered by The Block (<https://www.theblockcrypto.com/2019/01/31/video-shows-kik-ceo-discussing-ico-pre-sale-it-will-become-super-valuable/>) suggests.

## Kik's SEC Gambit



(<https://www.ccn.com>).



(<https://cdn.ccn.com/wp-content/uploads/2018/02/secpng.jpg>)

*Kik plans to fight the SEC's charge that the Kin ICO was an illegal securities offering. | Source: Shutterstock*

As CCN.com reported (<https://www.ccn.com/under-fire-from-the-sec-kiks-crypto-project-is-going-to-war/>), the SEC has sent Kik a "Wells submission," a prelude to suing the Canadian company for violating securities regulations via its nearly \$100 million (<https://www.ccn.com/kik-ico-raises-nearly-100-million/>) initial coin offering.

The letter from the SEC reads, in part:

This proposed action would allege violations of Sections 5(a) and 5(c) of the Securities Act. The recommendation may involve a civil injunctive action and may seek remedies that include a preliminary and permanent injunction, disgorgement, pre-judgment interest, and civil money penalties.

Kik (<https://www.ccn.com/under-fire-from-the-sec-kiks-crypto-project-is-going-to-war/>) has an opportunity, before the SEC files any formal litigation, to explain to the SEC why it should not investigate them. They did so on December 10.

Kik's Wells submission implies that the SEC is going out of bounds by even considering action against Kik.

The Staff has never suggested to us that offers or sales of Kin involved any fraud or other intentional misconduct. As such, the issue in dispute is whether

any sales or transfers of Kin amounted to offers or sales of a “security” – in other words, whether sales or transfers of Kin are within the scope of the Commission’s regulatory authority at all. For the reasons discussed below, we believe the proposed enforcement action would exceed the Commission’s statutory authority and, as such, would fail.

## The Video That Could Foil Kik’s Argument

However, in a video from 2017 uncovered by The Block, Livingston advertises the potential investment returns from the Kin token. At that point, Kin was still in the ICO stages of crypto-asset development.



## Howey Test

Simply having value doesn’t make a crypto-token a security. The so-called “Howey Test” applies to tokens the same as to other asset classes. The Howey Test (<https://securities-law-blog.com/2014/11/25/what-is-a-security-the-howey-test-and-reves-test/>) primarily deals with



the nature of asset investment. In the words of Frank Murphy, the US Supreme Court Justice (<https://www.ccn.com>) who essentially created the test:

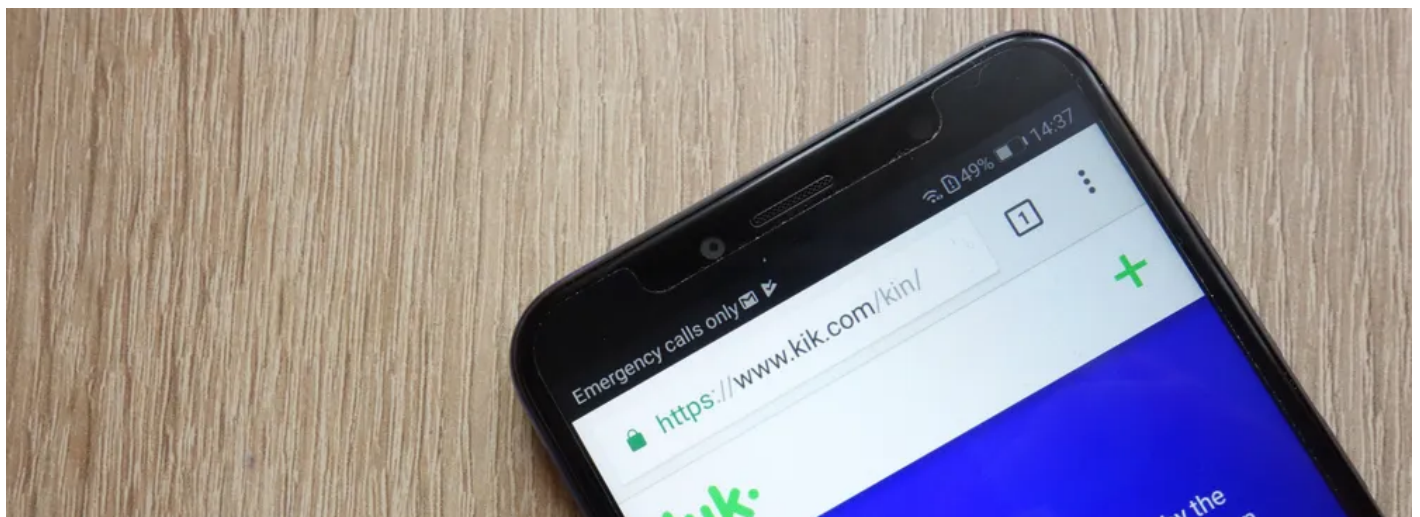
The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test be satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value.

There are four parts to the Howey test.

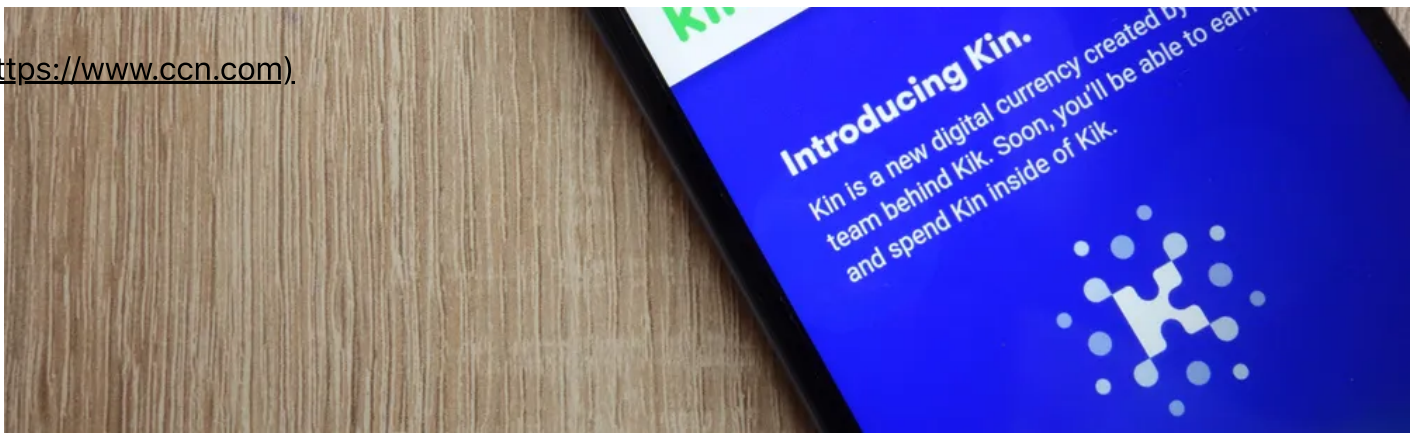
- **An investment of money exists.**
- **The enterprise must involve multiple parties.**
- **There must be an expectation of profit or appreciation of the investment.**
- **The effort that makes money must be the effort of others.**

Falling under these four categories can make you the subject of SEC enforcement. It's a tricky game to play, raising money. Securities must register, as outlined by the Securities Act. The part that Livingston may have fore-doomed in the above video is the expectation of profit.

## A Utility-Security Hybrid?



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<https://cdn.ccn.com/wp-content/uploads/2018/08/kin-cryptocurrency-kik.jpg>

Source: Shutterstock

Utility tokens perform a function. A security can double as a utility. The topic is very confusing when the many capabilities of blockchains are introduced.

Livingston says in the video:

We're gonna put [the Kin cryptocurrency] inside Kik and it will become super valuable on day one, we think.

Coming from the CEO of the company offering the asset, that looks an awful like suggesting that people should expect profit.

If the SEC investigates Kik, it will be the largest company to face a blockchain-related securities suit yet. The fallout could be minimal for a company with as much money as Kik, or it could be devastating.

In either case, at time of writing the Kin token had a dollar value of just \$0.000027 and a market capitalization of around \$20 million. It had seen a more than 1% rise over the 24-hour period. One wonders how the potential SEC case will affect the token.

*Featured Image from TechCrunch/Flickr*